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IN THE

# Supreme Court of the United States

OCTOBER TERM 1972

No. .....

RUDOLPH J. GERNETH and HENRICA J. GERNETH,
Petitioners,

v.

THE CITY OF DETROIT, A Municipal Corporation,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States;

RUDOLPH J. GERNETH and HENRICA J. GERNETH, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on August 17, 1972.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is printed, *infra,* in Appendix B, at Page 1(b). The opinion of the United States District Court, Eastern District of Michigan, Southern Division, is unreported and is printed in Appendix A, *infra,* at Page 8a.

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (Appendix B, *infra,* Page 7b) was entered on August 17, 1972. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

## QUESTION PRESENTED

May a municipal corporation be held liable in tort for injuries caused by a private guard negligently licensed by the municipal corporation?

## ORDINANCE INVOLVED

This case involves Chapter 47 of the 1954 Municipal Code of the City of Detroit, the pertinent part of which reads:

> Section 47-1-4. No person shall be licensed as a private patrol watchman within the city unless he is twenty-one years of age or over, a citizen of the

United States and has resided within the state for a period of not less than six months immediately preceding such application. Applicants must be physically and mentally sound. Each applicant must be able to read and write the English language. No such license shall be issued to a person who has been adjudged insane in this state or elsewhere or who has been convicted of a felony during the ten year period immediately preceding application. The ten year period shall be computed after the completion of sentence, parole or probation. The commissioner of police shall cause an investigation to be made of the character of the applicant and he shall refuse to recommend the issuance of a license, unless as a result of such investigation, the character of the applicant is found to be satisfactory.

## STATEMENT OF THE CASE

Plaintiffs, citizens of foreign countries, filed their Complaint against the City of Detroit in the United States District Court for the Eastern District of Michigan, Southern Division, on November 4, 1970. (See Appendix A, Page 1a). Jurisdiction of the federal courts was invoked by virtue of the diversity of the citizenship of the litigants. 28 USC Section 1332.

Plaintiffs claim that Plaintiff Rudolph J. Gerneth, while upon premises owned by the Greyhound bus lines within the City of Detroit, was attacked and beaten by Willie Wilder, a private guard. The assault, it is alleged, caused severe injuries to the Plaintiffs. Willie Wilder at the time of this assault was employed by the Williams Private Patrol, which had been retained by the Greyhound bus lines company to protect and secure persons and property upon its premises.

An ordinance of the City of Detroit (Page 2 of this petition) prohibited the granting of a private patrol watchman license to a person not mentally sound or who had been convicted of a felony within ten years prior to his application for a license. Willie Wilder had obtained such a license from the City of Detroit prior to his employment by the Williams Private Patrol. However, had the city officials made a proper check of his background, they would have discovered that Willie Wilder was not qualified to be licensed as a private guard, having been convicted of "careless use of firearms", a felony, in 1963.

Plaintiffs allege that but for the city's negligence in performing its licensing activities, Willie Wilder would not have been a licensed private guard employed by the Williams Private Patrol to protect the Greyhound bus premises.

The Defendant City of Detroit responded to the Complaint with a Motion to Dismiss or in the Alternative for Summary Judgment of No Cause of Action (Appendix A, *infra*, Page 7a). Defendant's supporting memorandums alleged several grounds for relief, including a challenge to the applicability of the ordinance to the situation involved and a challenge to the elements of proximate causation and duty.

The District Court granted Defendant's motion to dismiss, primarily holding that the city's licensing ordinances established no duty, no obligation, to the Plaintiffs. (See Appendix A, Page 11a). Plaintiffs appealed and the Court of Appeals for the Sixth Circuit affirmed the holding of the lower court by also concluding that the City of Detroit owed no legal duty to the Plaintiffs. (See Appendix B, Pages 1b, 7b).

## REASONS FOR GRANTING THIS WRIT

In 1961 the Supreme Court of the State of Michigan abolished the doctrine of governmental immunity from tort liability as it applied to municipal corporations. *Williams v. City of Detroit*, 364 Mich 231; 111 NW 2d 1 (1961). An attempt by the Michigan state legislature to statutorily reestablish this immunity in 1964, 1964 P.A. 170, failed for state constitutional reasons. *Maki v. City of East Tawas*, 385 Mich 151; 188 NW 2d 593 (1971), affirming 18 Mich App 109; 170 NW 2d 530 (1969). The state legislature substantially re-enacted this statute in 1970, 1970 P.A. 155, making, however, some changes of language in an attempt to avoid the earlier act's constitutional infirmities. At this time the newer statute's validity has not been passed upon by the highest court in the state.

Plaintiff's present tort cause of action arises out of an incident which occurred in 1967. The City of Detroit, Defendant in this action, was then liable for tort claims falling within the holding of *Williams, supra*. It is the nature and extent of a municipal corporation's tort liability in Michigan in 1967 which is the focus of this present petition.

As the Court of Appeals below noted, there appear to be no Michigan cases directly concerning the liability of a municipality for negligence in its licensing activities. Apparently because of this lack of precise Michigan precedent, the courts below, in reaching the conclusion that the city owed no duty to the Plaintiffs, relied primarily therefore upon general principles of law extracted from decisions from other jurisdictions (principally New York, Florida, Connecticut and Arizona), where, again, there are

no cases involving identical facts. Paintiffs contend, however, that while no Michigan cases are directly on point, general rules of law are to be found in Michigan cases which apply to the present fact situation and which mandate a result different from that reached below. Furthermore, Plaintiffs assert that the courts below incorrectly interpreted the law of these other jurisdictions as it applies to the present case.

By the time of *Williams, supra,* the defense of governmental immunity in Michigan had already been substantially eroded. Prior to *Williams,* municipal corporations were immune from tort liability only when performing a "governmental function" as opposed to a "proprietary function". See, *Carlisi v. City of Marysville,* 373 Mich 198; 128 NW 2d 477 (1964). It was this last vestige of immunity which *Williams* abolished in no uncertain terms. Justice Edwards, writing the main opinion, begins: (at 250, 111 NW 2d at 20):

> "From this day forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. In this case, we overrule preceding court-made law to the contrary. We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong. . . ."

The lengthy *Williams* opinion, or opinions, reflecting judicial frustration with legislative inaction, expounding upon theories of *stare decisis* and the power of courts to abrogate court-made rules, and haggling over fine issues of retroactive decisions versus prospective decisions, has, almost lost within it, one short core paragraph, which is,

in effect, the holding of the case. That paragraph reads: (at 260, 111 NW 2d, at 25, emphasis the court's).

> "We deal in this case with a declaration which would clearly state an ordinary tort claim against a private individual or a private corporation. Our holding herein is limited to the statement that there is no longer any judicial doctrine of governmental immunity *as to such a claim.*"

It is not without significance that this holding is supported by but one citation. In the middle of this paragraph the court interposes the following footnote:

> "Cf. 'The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.' 28 USCA, Section 2674 (Federal Tort Claims Act)."

Thus the Supreme Court of Michigan declared that in all actions sounding in tort brought against a municipality, the municipality is to be treated no differently than any other private defendant—just as the United States is treated no differently in actions brought against it under the Federal Tort Claims Act

The *Williams* decision could not be any clearer. In a tort action brought by a person against a municipality, the same rules of law are to be applied as though the municipality were a private litigant. Both courts below, ignoring this holding of the Michigan Supreme Court, applied to the City of Detroit a different standard of duty than would be applicable to a private party (see discussion below). Both courts below were mesmerized by the municipal character of the defendant into believing that when a municipality performs "governmental functions", bene-

fitting the general public, the municipality has then no "duty" to an individual plaintiff. While this legal conclusion is well supported by the case law of some other jurisdictions (which have seen no problem in adopting this rule for their purposes) the question is, is such reasoning applicable to Michigan?

The Michigan Supreme Court supplies an answer to this in *Clark v. Dalman*, 379 Mich 251; 150 NW 2d 755 (1967). The Court there defined "legal duty" as it presently exists in Michigan: (at 260-261, 150 NW 2d at 759-760, emphasis added)

> "Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. . . .
>
> Such duty of care may be a specific duty owing to the plaintiff by the defendant, *or it may be a general one owed by the defendant to the public, of which the plaintiff is a part.*"

True, this is a typical civil action brought by one private party against another—no municipal corporation is involved—but if the *Williams* holding is to be given any credence, then the rules of law established in a civil case may be readily transported to a case involving a municipality.

There is nothing in Michigan law indicating that a municipality's legal duty is anything less than that imposed upon any private party. Nothing exists in Michigan law indicating an intention to sever from "legal duty" as it applies to municipalities the general duty "owed by the defendant to the public" mentioned in *Clark v. Dalman, supra.*

It is interesting to note that the Court of Appeals below was reluctant to impose liability upon a city in the present situation "absent a statement to the contrary by the legislature or the highest court of the jurisdiction involved." Yet that same court did find it convenient to ignore the broad language of *Williams* in order to impose a restriction (the "special relationship" rule) upon the abolition of municipal liability contained therein without finding any authority in Michigan limiting the sweeping scope of *Williams.*[1]

If, in fact, a city can be held to have no duty to a person when the city performs a general governmental function, is not the result of such a holding the same as saying that a city is immune from liability for its governmental functions? In either case the defendant municipality escapes

---

[1] *Williams* does indicate that there may be a distinction made between discretionary acts of the government and non-discretionary acts in order that, "this crucial function of democratic decision making be unhampered by litigation," but this is a far cry from the "special relationship rule" as defined by the courts below.

liability for no other reason than the fact that it is a municipality. Would not such a ruling effectively negate the spirit and purpose of abolishing governmental immunity; would it not defeat entirely the *Williams* opinion which specifically concerned the immunity involved in performing a governmental function? Such a result, it is submitted, is in complete contradiction to the law of Michigan—to the *Williams* decision and to the definition of legal duty contained in *Clark*.

Michigan law is obviously quite capable of supplying those legal precepts necessary to resolve the issues raised in the present case. Plaintiffs allege that the City of Detroit, which had by ordinance undertaken the task of qualifying and licensing private guards, had performed this duty negligently, allowing a person manifestly unfit to be a private guard, according to the standards contained in the municipality's own ordinance, to become so licensed.

The Williams Private Patrol agency relied upon the city's representation that Willie Wilder was fit to be a private guard when hiring him to perform duties at the Greyhound bus terminal. There Plaintiffs—members of the public entitled to expect that the city would not be negligent in licensing a private guard—were injured by that very guard who was supposed to secure their safety. Indeed there are questions raised here concerning proximate causation, intervening cause, forseeability, and so forth—questions manifestly for the triers of facts—but it is clear that the Defendant cannot now escape liability on the grounds that it owed no "duty" to Plaintiffs. Having in its discretion undertaken the task of licensing, the city owed a duty to the public in general, and to Plaintiffs as members of that public, to exercise due care in the performance of that task or to be liable in tort for the negligent performance thereof. This is the lesson of *Williams* and *Clark*.

The courts below, in surveying the law from other jurisdictions completely ignored those cases decided by the federal courts under the Federal Tort Claims Act, 28 USC Section 2674. Yet, as has been previously mentioned, the Michigan Supreme Court, in establishing municipal tort liability, made parallel reference *only* to the Federal Tort Claims Act.[2]

At the time of the *Williams* decision, the Federal Tort Claims Act had already been judicially refined by this Supreme Court. Plaintiffs cited many federal tort claims cases in their briefs below, but only one need be mentioned here to indicate the significance of these decisions. In *Indian Towing Company, Inc. v. United States*, 350 US 61; 100 L ed 48; 76 S Ct 122 (1955) the plaintiffs accused the United States Coast Guard of negligently maintaining a lighthouse; which negligence proximately caused a tugboat to run aground and caused damage to the cargo contained in the barge being towed by the tugboat. The government argued that no liability under the act should attach when the government is performing a governmntal function for which there is no comparable private counterpart. The majority of the Court, speaking through Justice Frankfurter, rejected this argument and held instead: (at 69; 100 L ed, at 56; 76 S Ct, at 126)

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engenrered reliance on the guidance afforded by the light, it was obligated to use due care to make certain

[2] In abolishing governmental immunity the *Williams* majority did rely upon many cases from other jurisdictions. But in filling the legal vacuum left by the abolition of immunity the court adopted a rule of law duplicating the operative section of the Federal Tort Claims Act.

> that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

These comments are equally applicable to the present case. The Defendant need not have undertaken the licensing of private guards, but once it exercised its direction to do so and engendered reliance upon the guidance afforded by this licensing procedure, it was obligated to use due care in performing that task. If the city failed to do so, and damage was thereby caused to the Plaintiffs, then the Defendant is liable under the *Williams* decision, Michigan's equivalent of the Federal Tort Claims Act.

One of the Plaintiffs' contentions below was that their injuries were caused in part by the reliance the Williams Private Patrol placed upon the licensing of Willie Wilder by the Defendant. That this is not an exotic theory of liability is proven by the Supreme Court's language in *Indian Towing Company, Inc., supra,* that " . . . it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." (at 64; 100 L ed, at 53; 76 S Ct, at 124). This language is similar to the broad duty to the public concept of *Clark v. Dalman, supra.* Of even greater significance is the fact that the Supreme Court did not attempt, in *Indian Towing Company, Inc., supra,* to categorize the United State's tort liability into sets of duties owed to the public and duties owed to particular individuals. There is no "special relationship" requirement found in this case, where, it should be noted, the

petitioners included the towing company, the party owning the towed barge, the cosignee of the cargo, and the insurer of this cargo. All of these parties could recover despite the government's insistence (expressed in their brief) that when a "governmental" activity is performed relating to the safety, health and welfare of the community, no liability should attach.

Instead of looking to these federal cases or more thoroughly examining the applicable Michigan case law, the courts below adopted as controlling excerpts of law from other states. Most of the cases relied upon by the courts below are easily distinguishable from the present case. At least two cases, *Massengill v. Yuma County,* 104 Ariz 518; 456 P 2d 376 (1969), and *Simpson's Food Fair, Inc. v. City of Evansville,* 272 NE 2d 871 (Ind App 1971), involved governmental non-feasance, specifically the failure of police officers to perform their duty to prevent crime. One other case mentioned below, *Leger v. Kelly,* 142 Conn 585; 116 A 2d 429 (1955), comes out of a state that has yet to abolish governmental immunity. Admittedly these cases do contain language to the effect that no tort liability will arise from the negligent performance of an act benefiting the general public rather than an individual, but this language should be read with caution and circumspection. (See the discussion of the New York cases below). Furthermore, these cases do not find supporting parallels in Michigan, a fact made clear by the Florida stop sign case, *City of Tampa v. Davis,* 226 So 2d 450 (Fla 1969), cited by the court below. Florida there held that the city's failure to maintain a stop sign, a duty owed to the general public, would not be a basis for holding the city liable in tort. Michigan courts have adopted a completely opposite rule. Even before *Williams,* the Michigan Supreme Court held that a city's failure to replace a

knocked down stop sign, an admittedly governmental function, was a breach of the city's statutory liability to maintain public highways in reasonable repair. *O'Hare v. City of Detroit*, 362 Mich 19; 106 NW 2d 538 (1960); see also, *Lynes v. St. Joseph Road Commissioner*, 29 Mich App 51; 185 NW 2d 111 (1970). Thus in Michigan a party might recover damages for that very same act for which he would not recover in Florida.

Both parties have relied heavily upon New York cases since New York was one of the leaders in abolishing municipal immunity. The Court of Appeals below, for example, referred to *Whitney v. City of New York*, 27 App Div 2d 528; 275 NYS 2d 783 (1966) to support the proposition that an ordinance must be enacted to benefit an individual in order to make the city liable for its failure to abide by its ordinance. This case was again a non-feasance case, as it involved the city's failure to inspect boilers. A more recent New Sork Court of Appeals decision, *Smullen v. City of New York*, 28 NY 2d 66; 320 NYS 2d 19; 268 NE 2d 763 (1971) distinguished *Whitney*. In *Smullen* a city sewer construction inspector visited an excavation site and indicated that the walls of the excavation were safe. In fact the excavation was in an obviously unsafe condition, manifesting clear violations of a city ordinance. The excavation caved in and the plaintiffs' intestate was thereby killed. The court held the city liable, saying: (at 70, 320 NYS 2d, at 22; 268 NE 2d 765)

> "The question here, however, goes beyond the basic failure to perceive a violation. Here a blatant violation existed; the categorical regulations did not permit the inspector to form a judgment but he nevertheless proceeded to do so and wrongly adjudged the trench to be safe and stood by while decedent, knowing of his presence and approval, entered into the perilous situation."

The court in this case appears to emphasize not the public *v* private nature of the activity that the city was engaged in, but rather the positive *v* passive action of the city officer. The parallels to the present case are obvious. In licensing Willie Wilder the Defendant was making the same assurance of safety that the sewer construction inspector made to the excavators in New York. Both cities made these assurances in the face of evidence of obvious violations of the respective ordinances involved. To complete the paralled the Defendant here should also be held liable for its negligence in making these assurances.

Another New York case often quoted by the Defendant and the courts below is *H. R. Moch Company, Inc. v. Rensselaer Water Company*, 247 NY 160; 159 NE 896 (1928), and in particular this language of Justice Cardozo: (at 165; 159 NE, at 897)

> "An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose."

What is indeed shocking is that the Court of Appeals and the District Court, both adhering to this finely stated policy (the Court of Appeals even concluding its opinion with a paraphrase of this quote), do so in complete disregard of the explicit rejection of this same policy argument in Michigan. Compare Cardozo's caution with the Michigan Supreme Court's more enlightened view, as set forth in *Williams:* (at 258-260; 111 NW 2d, at 24-25)

> "If we examine the practical arguments advanced against change of this rule, we find, if anything, even less substance. Each brief speaks of the crushing weight of negligence awards which might bankrupt a small governmental unit. . . .

> In 1961, however, liability insurance is no new and untried device. We take judicial notice that it serves private citizens and private corporations as a means of prepaying and sharing just the sort of unexpected burden with which we deal in this case.
>
> This Court has just heard and rejected this same practical argument in relation to hospitals in this State. . . .
>
> In this case we follow the same course for the same reasons in relation to the previously immune governmental units. We do not ignore the fact that this decision cast in this form will, of course, occasion some minor increase in the tax burden due to the purchase of insurance. It would also serve to assure each taxpayer that if by chance a catastrophe befell him as a result of an ordinary tort committed by a public employee, the economic impact thereof would be shared with all other insureds, rather than falling with awesome tragedy upon the innocent victim alone."

The law of municipal immunity is in a state of flux. Municipal immunity has been abolished only within the last generation, and then only in less than half of the states. Prosser, in the fourth edition of his *Law of Torts*, notes, on Page 985, some twenty-three jurisdictions where cities are liable for their torts. The cases discussed above bear witness to the struggle within these jurisdictions to establish standards of liability applicable in the absence of immunity. These standards have yet to obtain sharp resolution, and attempts to extract definite rules from these highly variable precedents must be done with more care and with a far broader understanding of the problem than is to be found expressed in the decisions below.

The present factual situation is not new to this Supreme Court. In 1830 this Court considered a negligence suit against the Common Council of Alexandria, Virginia.

The city had failed to secure a bond from an auctioneer it licensed in violation of its licensing ordinance. Chief Justice Marshall concluded, in *Fowle v. The Common Council of Alexandria*, 3 Pet (28 US) 398; 7 L ed 719 (1830), that the Court could not impose liability upon the city in such a situation for the singular reason that there was just no precedent to support such a ruling. This reasoning is, of course, no longer viable. Precedent does now exist—it exits under the Federal Tort Claims Act, it exists in twenty-three state jurisdictions, it exists, most importantly, in Michigan. The courts below, Plaintiffs believe, have misinterpreted these precedents and have rendered judgments inconsistent with a well-reasoned analysis of the present law of municipal liability. The District Court incorrectly granted, and the Court of Appeals erroneously affirmed, Defendant's motion to dismiss. Plaintiffs now seek a reversal of these decisions.

## CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert G. Portnoy
*Counsel for Petitioners*
1832 Buhl Building
Detroit, Michigan 48226

SUGAR, SCHWARTZ, SILVER,
SCHWARTZ & TYLER
Stanley S. Schwartz
*Counsel of Record*
1832 Buhl Building
Detroit, Michigan 48226

## APPENDIX A

## COMPLAINT AND DEMAND FOR JURY TRIAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

### COMPLAINT

NOW COME Rudolph J. Gerneth and Henrica J. C. Gerneth, Plaintiffs herein, by and through their attorneys WILLIAM C. GAGE and SUGAR, SCHWARTZ, SILVER, SCHWARTZ & TYLER, and complaining against the above named Defendant, and for separate causes of action, say as follows:

1. That Rudolf J. Gerneth is a citizen of the Country of Germany and Henrica J. C. Gerneth is a citizen of the Country of Holland, both presently residing in the City of Southfield, County of Oakland, State of Michigan.

2. That this action is brought in the Federal Court by reason of the fact that Plaintiffs are citizens of a foreign country.

*Count 1*

3. That at all times hereinbefore and hereinafter mentioned, the City of Detroit was a governmental unit duly organized and existing under and by virtue of the laws of the State of Michigan and is located and exists in the County of Wayne, State of Michigan.

4. That at all times hereinbefore and hereinafter mentioned, Willie Wilder was a security guard in the employ of Samuel Williams d/b/a Williams' Private Patrol.

5. That at all times mentioned herein, Willie Wilder was acting within the course and scope of his said employ-

ment and/or agency under the supervision of and in the control of Samuel Williams d/b/a Williams' Private Patrol.

6. That on or about November 17th, 1967, Greyhound Lines, Inc. maintained, controlled and operated premises located at 130 East Congress Street, in the City of Detroit, County of Wayne, State of Michigan, for the purpose of furthering its business activities in the State of Michigan and to which the public was generally invited and in particular, Plaintiffs Rudolph J. Gerneth and Henrica J. C. Gerneth.

7. That on or about Friday, November 17th, 1967, at approximately 2:30 A.M., while Plaintiff Rudolf J. Gerneth was lawfully upon the premises of Greyhound Lines, Inc., located at 130 East Congress Street, in the City of Detroit, County of Wayne, State of Michigan, in his capacity as a business invitee, awaiting the arrival of his wife, who was travelling to Detroit via Greyhound Lines, Inc., he was suddenly and without warning forcefully, violently and brutally attacked, assaulted and beaten by Willie Wilder without cause of provocation with a clear intent to maliciously, viciously and intentionally injure your Plaintiff, Rudolf J. Gerneth.

8. That prior to the date of the incident giving rise to this cause of action, Samuel Williams d/b/a Williams' Private Patrol, through his servants and agents, had been involved in situations clearly indicating a vicious propensity in said servants and agents, they being prone to the use of physical force and violence without just provocation.

9. That prior to the date of the incident giving rise to this cause of action, and at all times herein mentioned, Willie Wilder was a person of vicious propensity, prone

to the use of physical force and violence without just provocation and said fact was known to the City of Detroit, by and through its agents, servants and employees, or, in the exercise of reasonable care, should have been known to said servants, agents and employees of Defendant City of Detroit.

10. That the City of Detroit, by and through the negligent acts of its employees, servants and agents, whose identities are presently unknown, caused Willie Wilder to be licensed as a private guard when they knew or should have known that he was an unfit person to perform the duties of said position by reason of the fact that he had vicious propensities and was emotionally unstable to carry on said duties.

11. That the City of Detroit, by and through the negligent acts of its employees, agents and servants, whose identities are presently unknown, failed to perform an adequate check of the criminal record of Willie Wilder in that they failed to disclose that Willie Wilder had a conviction for careless or reckless use of firearms and if proper and correct determinations were made, Willie Wilder would not have been licensed and/or hired by Samuel Williams d/b/a Williams' Private Patrol.

12. That the City of Detroit, by and through the negligent acts of its employees, agents and servants, whose identities are presently unknown, failed to fully investigate Willie Wilder's personal references given in support of his application for licensure when, in fact, if adequate investigation had been conducted with respect to said references, said individuals would have determined that Willie Wilder had previous difficulties and was emotionally unstable.

13. That the City of Detroit, by and through the negligent acts of its employees, servants and agents, whose identities are presently unknown, failed to ascertain the fact that Willie Wilder was emotionally unstable as well as intectually unqualified to be licensed as a private patrolman.

14. That the City of Detroit, by and through the negligent acts of its employees, servants and agents, whose identities are presently unknown, failed to determine that the gun licensing board had denied a license by reason of Willie Wiider's criminal record and yet renewed the said Willie Wilder's license, without conducting complete investigation and, in fact, improperly advised Samuel Williams d/b/a Williams' Private Patrol that Willie Wilder had no criminal record.

15. That the City of Detroit, by and through the negligent acts of its employees, servants and agents, whose identities are presently unknown, permitted Samuel Williams d/b/a Williams' Private Patrol to engage in business when they knew or should have known of the many complaints filed against employees of Samuel Williams d/b/a Williams' Private Patrol or, alternatively, failed to realize that a very complete and thorough investigation should be conducted of all individuals requesting licenses as private patrolmen who were to be employed by Samuel Williams d/b/a Williams' Private Patrol.

16. That as a direct and proximate result of Defendant's negligence, by and through the acts of its agents, servants and employees, whose identities are presently unknown, Willie Wilder was placed in a position of authority wherein he could cause great bodily harm to individuals and, in fact, did commit an assault and battery upon Plaintiff Rudolf J. Gerneth, as is more particularly hereinabove set forth.

17. That as a direct and proximate result of said assault and battery, as more particularly hereinbefore set forth and described, Plaintiff Rudolph J. Gerneth sustained serious and permanent bodily and emotional injuries, including, but not limited to: Injury to the central nervous systsem; Fractures of the skull; Sub-dural hematoma; Inter-cranial hemorrhaging; Pulmonary complications; Paraplegia; Degenerative brain changes with secondary cerebral convulsions; Osteomyelities, right trochanter and wing of right ilium; Paroxysmal auricular fibrillation; Hemarthrosis, left knee; Cord Bladder; Lesions of the spinal cord; Paralysis of the body; Impairment of the senses; Emotional, mental and nervous disorder and disturbance; all of the above causing physical, emotional and mental pain, disability and crippling effects. That all of the above injuries, conditions and sequelae are permanent in nature.

18. That as a direct and proximate result of said assault and battery, as more particularly hereinbefore set forth and described, Plaintiff Rudolf J. Gerneth has been required to expend and/or incur various sums of money for medical care and treatment and will be required to undergo further hospital and medical care and treatment for the rest of his natural life as a consequence of the permanent injuries so wrongfully inflicted.

19. That as a direct and proximate result of said assault and battery, as more particularly hereinbefore set forth and described, Plaintiff Rudolf J. Gerneth sustained a loss of earnings and a permanent diminution of earning capacity.

Wherefore, Plaintiff Rudolf J. Gerneth claims judgment against the Defendant The City of Detroit in the amount of one million, five hundred thousand ($1,500,000.00) dollars, together with interest, costs and attorney fees.

DEMAND FOR TRIAL BY JURY IS HEREBY MADE.

*Count II*

1. Plaintiff Henrica J. C. Gerneth repeats and realleges each and every allegation contained in paragraphs 1 and 2 and paragraphs 3 through 19, inclusive, of Count I of this Complaint with the same force and effect as though more fully set forth herein.

2. That as a direct and proximate result of said assault and battery, as more particularly hereinabove set forth and described, inflicted upon Plaintiff Rudolf J. Gerneth, Plaintiff Henrica J. C. Gerneth has been required to sustain damages with respect to being deprived of the comfort, companionship, society, consortium and services of her husband, Rudolf J. Gerneth.

Wherefore, Plaintiff Henrica J. C. Gerneth claims judgment against the Defendant The City of Detroit in the amount of Five Hundred Thousand ($500,000.00) Dollars, together with interest, costs and attorney fees.

DEMAND FOR TRIAL BY JURY IS HEREBY MADE.

William C. Gage and
Sugar, Schwartz, Silver,
Schwartz & Tyler
By: /s/ Stanley S. Schwartz
Stanley S. Schwartz and
William C. Gage
Attorneys for Plaintiffs
950 Guardian Building
Detroit, Michigan 48226
964-5300

Dated: November 4th, 1970.

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## MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT CITY OF DETROIT

(U.S. District Court—Eastern District of Michigan—Southern Division)

Now comes the City of Detroit, Defendant in the entitled cause, by its Attorneys, Michael M. Glusac, Corporation Counsel, and William P. Doran and Thomas H. Gallagher, Assistants Corporation Counsel, and moves the court for an order of dismissal or, in the alternative, for summary judgment of no cause for action for the following reasons:

1. That Plaintiffs' Complaints fails to state a cause of action upon which the court can grant relief as against the Defendant City of Detroit.

2. That Plaintiffs' Complaint clearly fails to raise any legitimate issues of material fact to be tried as between Plaintiffs and this Defendant.

This motion is based upon the files and records in this cause and upon the Affidavit of William P. Doran which is attached hereto and by reference made a part hereof.

The undersigned William P. Doran, Attorney for Defendant City of Detroit, contacted Mr. Stanley S. Schwartz, Attorney for Plaintiffs, by telephone on November 30,

1970, and was apprised by the said Stanley S. Schwartz that the motion hereinabove set forth would be opposed.

Michael M. Glusac
Corporation Counsel for the
City of Detroit
William P. Doran
Thomas H. Gallagher
Assistants Corporation Counsel
Attorneys for Defendant
City of Detroit
By: /s/ William P. Doran
Assistant Corporation Counsel
555 Police Headquarters
Detroit, Michigan 48226
224-4238

Dated: December 2, 1970.

## OPINION OF THE COURT

(U. S. District Court—Eastern District of Michigan—Southern Division)

Proceedings had in the above-entitled matter before the Honorable Talbot Smith, District Judge, at Detroit, Michigan, on Monday, December 13, 1971.

Appearances: Samuel Cross, appearing for and on behalf of the Plaintiffs; William P. Doran, appearing for and on behalf of the Defendant.

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(2) The Court: I take it that the statement here in the Plaintiff's brief is a pretty fair statement of the theory on which this action the city had brought, "with a duty on the part of the City, acting through its employees, to perform all activities in a reasonable and prudent fashion." Not much quarrel about that.

"The City is obligated," it goes on, "to protect its citizens from the activities of private individuals," etc. Well, there's a lot of conclusions there, but we'll pass them over for the moment.

Now, we get down to duty. The argument is, as evidence of this duty, the City of Detroit enacted an ordinance requiring private patrol watchmen and private patrol services to be licensed. I see that the pleadings disclose the publication of this ordinance.

The argument here is that regardless now of the question of proximate cause, which is another problem, the argument made here is that, since the city voluntarily assumed licensing, they had a duty to use due care. The difficulty comes at this point: The fallacy in the argument of the Plaintiff is that an obligation to the public at large—and you'll remember here this was an ordinance for the preservation of public peace, health, safety and welfare of the people—as I say here, the fallacy is that the obligation to the public at large does not, as a matter of law, create a cause of action in an individual inhabitant of the city. You just can't lump the two together.

Mr. Justice Cardozo, I think, expressed the matter well with his usual felicity, when he pointed out in the Moch Water case, "that an assumption of duty to the city is not to its inhabitants. An intention," he went on—and I'm reading from the opinion—"an intention to assume an obligation of indefinite extension to every member of the public is seen," he says, "to be the more improbable when we

recall the crushing burden that the obligation was to impose."

And that's well settled law. You simply cannot equate a general obligation to the public to the creation of an individual cause of action in each of the inhabitants; and the reason, as Mr. Justice Cardozo pointed out, is that that you cannot assume that the city is going to assume such a crushing burden.

But even getting over the question of duty, which you can't get over, but even assuming the duty and a negligent breach, you cannot assume that the intervention of a private wrong on the part of the individual, is a necessary or probable result of his hiring, even though he may have a felony on his record.

You just can't make that assumption. If you could, considering the number of cases I see in here of felons, there would be a large part of the public that couldn't have any job whatever having to do with any part of the public. That's just not the law.

You cannot assume, as a matter of proximate cause, that the intervention, the wilful, deliberate intervention of a wrongful act, even a felony, by an individual, is going to subject the city to liability; and so for those reasons, as well as the others expressed in the City's brief, which I need not discuss, I'm going to grant the motion to dismiss. There is no cause of action against the City, and you may present your necessary order. I thank both of you gentlemen for your briefing that you did in this case.

Mr. Doran: In the hope, your Honor, that might be the outcome, I have prepared an order which—

The Court: Well, I have no doubt that your brother over there has an order, too. The only thing is I'm going to sign yours and not his.

• • • • •

## ORDER OF DISMISSAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed December 22, 1971)

At a session of the above court, held in the Federal Building, County of Wayne, City of Detroit, State of Michigan, on December 13, 1971.

Present: The Honorable Talbot Smith, U. S. District Judge.

This matter having come on to be heard on motion of defendant City of Detroit, answer and brief having been filed by the plaintiff, arguments having been presented in open court by the counsel for the parties involved, and the court being otherwise fully advised in the premises,

It is hereby ordered that the above-entitled cause may be dismissed with prejudice and without costs to either party.

Talbot Smith,
U. S. District Judge.

## APPENDIX B

No. 72-1165

## UNITED STATES COURT OF APPEALS

For the Sixth Circuit

| | |
|---|---|
| Rudolph J. Gerneth and Henrica J. C. Gerneth, *Plaintiffs-Appellants*, v. The City of Detroit, a Municipal Corporation, *Defendant-Appellees.* | APPEAL from the United States District Court, Eastern District of Michigan, Southern Division. |

### OPINION

Decided and Filed August 17, 1972

Before: Phillips, Chief Judge, Celebrezze and Kent, Circuit Judges.

Kent, Circuit Judge. This is an action in which jurisdiction is based upon diversity of citizenship, each of the plaintiffs being a citizen of a foreign country. The suit is for damages because of serious personal injuries sustained by plaintiff, Rudolf J. Gerneth, on November 1, 1969, when he was shot by Willie Wilder, a private patrolman employed by Williams Private Patrol as a guard at the Greyhound bus station in Detroit, Michigan.

In accordance with the ordinances of the City of Detroit Willie Wilder's name had been submitted to the Detroit Police Department for an investigation and licensing before employment. The ordinance makes provision for denial of a license if the applicant has been previously ad-

judged insane or convicted of a felony.[1] The same ordinance provides that it shall not be applicable to persons "engaged in the business of protecting persons, passengers and property being transported in interstate or intrastate commerce within the city by common carrier and the protection of the property of such common carrier within the city." (C.O. 1954, Ch. 47, § 47-1-1).

Investigation by the city upon application by Williams Private Patrol for a license for Willie Wilder failed to reveal the fact that Wilder had been convicted in 1963 of the felony, "careless use of firearms." Plaintiffs claim that had the city not undertaken to provide licensing after investigation Williams Private Patrol would have made its own investigations, but did not do so because of reliance upon the city's investigation.

On motion the District Judge dismissed the complaint on the ground that the undertaking by the city to license private patrolmen did not create any obligation or duty

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[1] Sec. 47-1-4. Same—Qualifications of applicants.

No person shall be licensed as a private patrol watchman within the city unless he is twenty-one years of age or over, a citizen of the United States and has resided within the State for a period of not less than six months immediately preceding such application. Applicants must be physically and mentally sound. Each applicant must be able to read and write the English language. No such license shall be issued to a person who has been adjudged insane in this state or elsewhere or who has been convicted of a felony during the ten year period immediately preceding the date of such application. The ten year period shall be computed after completion of sentence, parole or probation. The commissioner of police shall cause an investigation to be made of the character of the applicant and he shall refuse to recommend the issuance of a license, unless as a result of such investigation, the character of the applicant is found to be satisfactory. (C.O. 1954, ch. 432, § 4; Ord. No. 198—G § 1; Ord. No. 278-G, §1).

to private persons, the violation of which would justify an action for damages for failure to perform the duty properly. The trial court relied upon the opinion of Mr. Justice (then Judge) Cardozo in *H. R. Mock Co.* v. *Rensselaer Water Co.*, 159 N.E 896, 247 N.Y. 160 (Court of Appeals, 1928). While *Mock* was not a suit against a municipal corporation the language of Mr. Justice Cardozo is enlightening. Rensselaer Water Company had contracted with the city to supply its water requirements. It was claimed that the company had negligently failed to supply adequate water during a fire which destroyed plaintiff's building. Speaking for the Court Mr. Justice Cardozo said:

> "An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation was to impose. • • • The consequences invited would bear no reasonable proportion to those attached by law to defaults not greatly different." 159 N.E., at 897, 898.

A diligent search has revealed no Michigan decision which considers the issues raised in this case. Until 1961 municipal corporations in Michigan were immune from tort liability. This immunity was abolished in *Williams* v. *City of Detroit*, 364 Mich 231 (1961). By Act No. 170 of the Public Acts of 1964 the Michigan Legislature exempted municipal corporations from tort liability except for certain narrow specific exceptions. This Act was held unconstitutional as being broader than the title of the Act, *Maki* v. *City of East Tawas*, 385 Mich. 151 (1971). The legislature acted promptly by expanding the title of the Act rather than by limiting the immunity of municipal corporations in Michigan, Act No. 155, Public Acts of

1970, M.S.A. §3.996(107).[1] The Michigan Supreme Court has not had occasion to discuss the tort liability of municipal corporations since the enactment of Act No. 155. The issue has been presented to the courts of other states.

Municipal corporation immunity was abolished in Florida in 1957. Certain limitations on the extent of liability are delineated in *City of Tampa* v. *Davis*, 226 So.2d 450 (1969). In discussing the liability of the City of Tampa for negligently failing to replace a stop sign at an intersection where the plaintiff was subsequently injured in a collision, allegedly because of the sign's absence, the Florida Court of Appeals said the following:

> "So what we are simply talking about is that area of municipal tort liability where the tort of the municipality's agent is committed in the performance or nonperformance of an executive (or administrative) duty in carrying out a 'governmental function.' 226 So.2d., at 452.
>
> "A municipality is liable for its negligence under the doctrine of respondeat superior when such negligence is committed by its agent or employee in the performance of a duty within the scope of a governmental function *only when such tort is committed against one with whom the agent or employee is in privity or with whom he is dealing or is otherwise in a direct transaction or confrontation.* 226 So. 2d., at 454 (Emphasis original).

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[1] §3.996 (107) Governmental function; immunity from tort liability; immunity of state.] Sec. 7. Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed.

> "The duty owed by the city's agents or employees, as to the plaintiff, was no different at the time of the alleged negligence than that owed to every other member of the public. In short, the duty breached was a public duty, not a duty owed to the individual injured, foreseeability notwithstanding." 226 So.2d, at 454-5.

The same standard was applied by the Florida Court of Appeals in *Town of Largo* v. *L & S Bait Co. of Florida, Inc.*, 256 So.2d 412 (1972), where the Court held that the Town of Largo could not be held liable for damages caused by negligently causing a sewer to back up on to plaintiff's property. A similar conclusion has been reached under other circumstances in *Whitney* v. *City of New York*, 275 N.Y.S.2d 783 (App.Div. 1st, 1966). A wife sued the City of New York for negligently failing to inspect a boiler as required by city ordinance. The boiler later exploded killing her husband. In rejecting the plaintiff's theory of liability for damages the Appellate Division said:

> " . . . plaintiff seeks to impose liability on the City, merely because the City failed to carry out a statutory function. Unless it can be said that the statute was enacted for the benefit of an individual, no liability may be imposed for failure to carry out the statutory function. * * * . . . mere failure to perform a stastutory government function, does not alone lead to liability in tort." 275 N.Y.S.2d., 784-5.

See also *Simpson's Food Fair, Inc.* v. *City of Evansville*, 272 N.E.2d 871, (Indiana Court of Appeals, 1971); *Massengill* v. *Yuma County*, 456 P.2d 376 (Arizona, 1969), noted in *Rose* v. *Mackie*, 22 Mich App. 463, 177 N.W.2d 633 (1970).

The rule relating to responsibility for such alleged negligence has been summarized in *2 Cooley, Torts* (4th Ed 1932); § 300, p. 385, as follows:

> "The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be redressed, if at all, in some form of public prosecution."

Quoted in *Leger* v. *Kelly*, 142 Conn. 585, 116 A.2d 429, at 432 (1955); *People of the State of Illinois, for Use of Trust Co. of Chicago* v. *Maryland Casualty Co.*, 132 F.2d 850, 852, 853, (7th Cir. 1942), and *Masengill* v. *Yuma County*, 456 P.2d 376, 379 (Ariz. 1969).

The Court in *Leger* laid down an additional test to be utilized in determining when the breach of a duty by a public officer provides a basis for a tort action.

> "If the duty imposed upon the public official by the statute is of such a nature that the performance of it will affect an individual in a manner different in kind from the way it affects the public at large, the statute is one that imposes upon the official a duty to the individual, and if the official is negligent in the performance of that duty he is liable to the individual."

The only Michigan cases which discuss the issue before this Court appear to be inapplicable. *Raymsford* v. *Phelps*, 43 Mich. 342 (1880); *People for use of Lapeer County Bank v. O'Connell*, 214 Mich. 410 (1921).

It appears to this Court that the imposition of a duty to one in the position of plaintiff, Rudolph J. Gerneth,

and a resultiig liability for damages for breach of such duty would impose an undue burden upon municipal corporations, and might in fact substantially interfere with the licensing and investigatory functions of such municipal corporations. It appears to us that as a matter of public policy, absent a statement to the contrary by the legislature or the highest court of the jurisdiction involved, the imposition of liability for damages for breach of such a claimed duty would be anappropriate under the circimstances of a case such as this. There is no basis for a conclusion that the Detroit City Council, in enacting the ordinance in question (paraphrasing the language of Mr. Justice Cardozo), "intended to assume an obligation of indefinite extension to every member of the public . . . and the crushing burden which such obligation might impose."

Judgment affirmed.

## JUDGMENT

(U. S. Court of Appeals—Sixth Circuit)

Before: Phillips, Chief Judge, Celebrezze and Kent, Circuit Judges.

Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiffs-appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ James A. Higgins,
Clerk.